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In the Supreme Court
of the United States

OCTOBER TERM 1971

No. 71-900

UNION OIL COMPANY OF CALIFORNIA,
a corporation,

Petitioner,

v.

The Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, their engines, boilers, tackle, apparel and furniture; and STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Union Oil Company of California, a corporation, prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been officially or unofficially reported; the full text of the opinion appears in the Appendix (A. 26).

The opinion of the United States District Court for the District of Oregon is reported at 304 F. Supp. 519 (D. Or. 1969). A copy of this opinion appears in the Appendix (A. 19).

In both the District Court and the Circuit Court this case was consolidated with, considered, and determined together with a companion case entitled "Star & Crescent Towboat Company, a corporation, and Oliver J. Olson & Company, a corporation, Cross-Plaintiffs, v. Union Oil Company of California, a corporation, and the Tanker SS Santa Maria, Cross Defendants."

JURISDICTION

The judgment sought to be reviewed is dated and was entered of record on December 2, 1971.

The statutory provisions believed by petitioner to confer jurisdiction upon this Court to review the judgment in question are 28 U.S.C. § 1254 and 28 U.S.C. § 2101(c).[1]

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[1] Reprinted in Appendix at 37-38.

QUESTIONS PRESENTED FOR REVIEW

1. Does Article 16 of the Inland Rules, 33 U.S.C. § 192, which provides that "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed," permit a court of appeals to adopt a rule that a vessel navigating near a fog bank must proceed at a speed which would enable her to be stopped in one-half the distance between her and a point along her projected course at which she might collide with any vessel emerging from the fog on any course?

2. Does the admiralty rule of equal division of damages apply to a collision in which one vessel has been flagrantly negligent while the other vessel has committed a minor statutory infraction which may not even have been a contributing cause of the collision?

STATUTORY PROVISIONS INVOLVED

The following federal statutes relevant to this petition are set out in the Appendix: 28 U.S.C. §§ 1254, 1333(1) and 2101(c); 33 U.S.C. § 192.

STATEMENT OF THE CASE

A. Statement of facts

This case involves a collision on the Columbia River between petitioner's tanker, the Santa Maria, and a barge towed by respondent's tug, the San Ja-

cinto, after the tug made an abrupt U-turn in front of the tanker. The District Court absolved the Santa Maria from any blame and found the San Jacinto in violation of numerous rules of navigation (A. 21-23). The Court of Appeals reversed, holding the Santa Maria liable for half damages on the ground that it violated the moderate speed in fog rule (A. 36).

The tanker was proceeding upriver at night at half speed, approximately 7 knots. It was on the Oregon side of a narrow channel, and although there was patchy fog on the Washington side, the visibility upriver was one and one-half to two miles. The pilot of the tanker sighted the tug, both visually and on radar, more than a mile ahead, proceeding downriver on the Washington side. The tug then disappeared into a patch of fog, and the tanker pilot assumed it would continue downriver. The master of the tug, however, became disoriented in the fog, and, believing the tanker had veered to the Washington side of the river, executed a sharp left U-turn *toward* the tanker in an attempt to run away from it. The crew of the tanker spotted the tug emerging from the fog just as it was commencing its turn. The tanker immediately put its engines in reverse and sounded danger signals. The tug completed its turn ahead of the tanker, but the barge it was towing swung around and smashed into the tanker's port bow, driving the tanker aground.

B. Basis for federal jurisdiction

This being a civil case in admiralty, District Court jurisdiction was founded upon 28 U.S.C. § 1333(1).

REASONS FOR ALLOWING THE WRIT

I

A writ of certiorari should be granted in this case because the Court of Appeals for the Ninth Circuit has rendered a decision on an important question of maritime law which is in conflict with decisions of other courts of appeals and the United States Supreme Court. The question involves interpretation of that part of Article 16 of the Inland Rules, 33 U.S.C. § 192, which reads:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

Since the statute itself does not define moderate speed, the Court of Appeals has declared the term, as it applies to a ship immersed in a fog, to mean " 'a speed at which she [can] be stopped dead in the water in one-half the visibility before her.' " (A. 30). Where, as in this case, a ship is navigating near fog,

> ". . . the speed and visibility calculations must be performed: '. . . with reference to the distance within which she could be brought to a stop in the water, before *any* course of *any* vessel emerging from the fog on either side would cross her projected course along the fog bank at its nearest point.' *The Silver Palm*, 94 F.2d 754, 767 (9th Cir. 1937) (emphasis in original)." (A. 31).

This judicial gloss on Article 16 is acknowledged by the Court of Appeals to be in conflict with the de-

cision of the Fifth Circuit Court of Appeals in *Hess Shipping Corp.* v. *SS Charles Lykes*, 417 F.2d 346 (5th Cir. 1969) aff'd. on reh. en banc, 424 F.2d 633, cert. den. 400 U.S. 853, reh. den. 400 U.S. 931 (A. 34). The Court of Appeals decision also is in conflict with decisions in the Second Circuit,[2] the Third Circuit,[3] and this Court.[4] The rule adopted by these courts is that moderate speed is relative and depends upon the circumstances of each case. "The standard of moderate speed as set forth in the statute is necessarily vague. Moderate speed, while less than full speed, is a relative term which depends upon the circumstances of each case. *Polarus S/S Co.* v. *T/S Sandefjord*, 1956 A.M.C. 1779, 236 F.2d 270 (2nd Cir. 1956)." *Hess Shipping Corp.* v. *SS Charles Lykes*, 417 F.2d at 349. "What is a moderate speed in a given situation must, of course, depend upon the facts of the particular case if regard is to be had for 'the existing circumstances

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[2] See *Polarus S/S Co.* v. *T/S Sandefjord*, 236 F.2d 270 (2d Cir. 1956), cert. den. 352 U.S. 982; *The Bayonne*, 213 F. 216 (2d Cir. 1914); *Villain & Fassio E. Compagnia* v. *Tank Steamer E. W. Sinclair*, 207 F. Supp. 700 (S.D. N.Y. 1962), affd. 324 F.2d 563; *Skibs A/S Siljestad* v. *S. S. Mathew Luckenbach*, 215 F. Supp. 667 (S.D. N.Y. 1963), affd. 324 F.2d 563.

Judge Learned Hand specifically points out the conflict between circuits and criticizes the Ninth Circuit rule in *Oil Transfer Corp.* v. *Westchester Ferry Corp.*, 173 F. Supp. 637, 639 (S.D. N.Y. 1958).

[3] See *The Bohemian Club*, 134 F.2d 1000 (3d Cir. 1942), rev'd on other grounds, 320 U.S. 462; *Cf. Norscott Shipping Co.* v. *Steamship President Harrison*, 308 F. Supp. 1100 (E.D. Pa. 1970).

[4] See *The Pennsylvania*, 86 U.S. 125 (1874); *The Chattahoochee*, 173 U.S. 540, 19 S. Ct. 491, 43 L. Ed. 801 (1899); *The Umbria*, 166 U.S. 404, 17 S. Ct. 610, 41 L. Ed. 1053 (1897).

and conditions'." *The Bohemian Club*, 134 F.2d 1000, 1002 (3rd Cir. 1942).

This objective approach was mandated by this Court in *The Pennsylvania*, 86 U.S. 125, 133 (1873):

> "What is [moderate] speed may not be precisely definable. It must depend upon the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others."

The Court's view was reaffirmed in an opinion by Justice Brown, an acknowledged admiralty authority, in *The Chattahoochee*, 173 U.S. 540, 19 S. Ct. 491, 494, 43 L. Ed. 801 (1899):

> "No absolute rule can be extracted from these cases. [The Court examined English and American cases involving excessive speed.] So much depends upon the density of fog and the chance of meeting other vessels in the neighborhood, that it is impossible to say what ought to be considered moderate speed under all circumstances."

See also *The Umbria*, 166 U.S. 404, 17 S. Ct. 610, 41 L. Ed. 1053 (1897). This is also the rule in England. See *The Bharatkhand*, (1952) 1 Lloyd's List L.R. 470.

Ironically, the Ninth Circuit's half-distance rule seems to have originated in a misinterpretation of *The Chattahoochee* and *The Umbria*. See *The Silver Palm*, 94 F.2d 754, 757 (9th Cir. 1937). Presumably *The Silver Palm* derived the rule from the following statement:

> "It has been said by this Court in respect to

> steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law."[5]

The Chattahoochee, 19 S. Ct. at 494; see also *The Umbria*, 17 S. Ct. at 616.[6] However, it is clear from reading these opinions that the Court did not intend to lay down a mechanical rule which would relieve courts of their duty to scrutinize all of the circumstances of each case. For example, in *The Umbria*, Justice Brown commented on the rule that a vessel approaching another vessel in a fog should maintain her course (Id. at 613):

> "But although I entirely agree that that is a good general rule to lay down, yet the rule must be interpreted in each case according to the circumstances of that case. It is impossible to lay down an abstract rule of that description which shall be applicable to all circumstances, to all parts of the seas, and to all positions of vessels."

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[5] If indeed this language were the provenance of the half distance rule it would render the rule inapplicable to this case, since the San Jacinto was not "going at the moderate speed required by law." The trial court found the San Jacinto in violation of Article 16 in proceeding at an unreasonable speed (A. 23). This finding was not questioned by the Court of Appeals.

[6] *The Umbria* and *Chatahoochee* have also been cited for the proposition that moderate speed means "the lowest rate of speed consistent with good steerage way." *The Chattahoochee*, 19 S. Ct. at 494. However, this dictum has been properly recognized as being merely a reference to one of the circumstances which must be taken into account in deciding a case. See *Polarus Steamship Co.* v. *The T/S Sandefjord*, *supra*, note 2 at 272.

There is no reason to suppose that the Court took a different view of the moderate speed rule.

In addition to this conflict, the half-distance rule suffers from three serious deficiencies. First is its rigidity. The Court of Appeals maintains that the rule takes from the hands of pilots the discretion as to what is reasonable under the prevailing conditions and imposes "a formula to fit all circumstances." (A. 35). But this reasoning ignores the view of this Court that "in cases of this kind . . . something must be left to the judgment and discretion of the master," *The Umbria*, 17 S. Ct. at 615, and that Article 16 gives a navigator "discretion as to what shall be 'moderate speed' in a fog . . . ." *Lie* v. *San Francisco and Portland Steamship Co.*, 243 U.S. 291, 37 S. Ct. 270, 272, 61 L. Ed. 726 (1917). Despite the Court of Appeals' assurances, the half-distance rule does not fit all circumstances because it fails to take account of such variables as the location of the vessels (here a narrow channel), the conditions of the atmosphere, wind and weather, the size, weight and maneuverability of the vessel, the manner in which she was designed to go astern, her available steam and engine power, whether she has single, twin or multiple screws, her type of steering gear, the likelihood of meeting other vessels in the area,[7] whether the vessels are meeting head-on or on intercepting courses, and whether a change in course to avoid collision rather than a reversal of en-

[7] See *The Chattahoochee*, 173 U.S. at 548.

gines is feasible.[8] See Marsden's *Collisions at Sea* (10th Ed.) 479, 481; also *Robinson on Admiralty* (1939) 817.

Failure to consider all of the circumstances has produced a particularly harsh result in this case. Petitioner's ship, the Santa Maria, was proceeding upriver, on its own side, at half speed (approximately 7 knots), in visibility forward of one and one-half to two miles. The Santa Maria's pilot sighted, both visually and on radar, the San Jacinto over a mile away proceeding downriver on the opposite bank and assumed, quite reasonably, that she would continue downriver. As this Court has observed, "there is a point . . . beyond which precautions are unnecessary, and the master has the right to assume that he has shaken off the other vessel; . . ." *The Umbria*, 17 S. Ct. at 612. The Santa Maria's continued speed of 7 knots presented no danger to the San Jacinto. See *The Nacoochee*, 137 U.S. 330, 339, 11 S. Ct. 122 (1890). There was no risk of collision until the San Jacinto made an abrupt, unexpected and unlawful turn across the bow of the Santa Maria.[9]

Perhaps the most serious objection to the half distance rule from a mariner's point of view is that it is confusing, complicated, and in some cases unworkable. The general version of the rule, that a ship in fog must be able to stop within one-half the forward visi-

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[8] Considerations of space prevent a fuller discussion of this argument.

[9] A ship is not obliged to anticipate improper navigation. *Great Lakes Dredge & Dock Co.* v. *The Santiago*, 155 F.2d 148, 150 (2d Cir. 1946).

bility, is simple enough. But the rule stated in this case with respect to ships operating *near* a fog is more complicated. "[S]peed and visibility calculations must be performed: '. . . with reference to the distance within which she could be brought to a stop in the water, before *any* course of *any* vessel emerging from the fog on either side would cross her projected course along the fog bank at its nearest point' " (A. 31), is not a self-explanatory formula.[10] The Court of Appeals itself avoids applying this formula to the facts and instead decides that the relevant distance is 900 feet, the distance separating the vessels when the Santa Maria first saw the tug emerging from the fog (A. 30). This produces a maximum lawful stopping distance of 450 feet. While there is no evidence of the stopping ability of the Santa Maria, it is fair to assume that a tanker over 500 feet in length with a 17,000 ton load would have to be proceeding at a virtual snail's pace in order to stop in less than its own length. If the speed required happens to be less than bare steerageway, then the Santa Maria could have safely complied with the half-distance rule *only by dropping its anchor at the first sight of the San Jacinto. What is more, the rule might have obliged the San Jacinto to do likewise upon sighting the Santa Maria!* Surely such a result, which would produce

[10] For an illustration of the complicated charts, diagrams, and tabulations called for by this formula, see the opinion in *The Silver Palm*, 94 F.2d 754 (9th Cir. 1937). Presumably the Court felt that these calculations are readily performable by a pilot while maneuvering his ship in reduced visibility.

chaos especially on inland waterways, was not intended by Congress when it enacted the statute.[11]

Finally, the Ninth Circuit's half-distance rule violates the principle of uniformity in admiralty rules that is so essential to maritime operations. Congress has expressed a "strong concern" for uniformity in admiralty rules. *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 401, 90 S. Ct. 1772 (1970). Moreover, Article 16 applies not only to inland waters but is an *international* rule as well.[12] See 33 U.S.C. § 1077. If different jurisdictions adopted substantially different interpretations of this rule the resulting confusion would be intolerable. It is imperative that nautical rules of the road be the same regardless of the judicial circuit in which a ship's master finds himself—if he even *knows* which circuit he is in. Thus it is of extreme importance for this Court to review this case and reaffirm the rule set out in *The Pennsylvania*, *supra*, and followed by all other circuits which have applied Article 16, as well as England, that what is

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[11] For an indication of legislative intent underlying Article 16 see note 12 *infra*.

[12] Article 16 was adopted by the International Marine Conference of 1889. In addressing the conference with respect to this Article, the United States delegate said:

> ". . . [I]n the flexibility of this rule is its safety. Its flexibility permits a man to adapt his speed according to circumstances; and the duty which is put upon him by this rule is that he shall comply with it according to the circumstances under which he finds himself placed. . . . So you will find it impossible to lay down a definite rule as to what moderate speed means under all the different and differing circumstances in which vessels will find themselves placed."

Quoted in *Knight's Modern Seamanship* (10th Ed. Rev. 1941) 387.

"moderate speed" depends upon the "existing circumstances and conditions" of each case.

II

Also involved in this case is an American rule of admiralty which, almost from its very adoption by this Court over a century ago, has been criticized as primitive and unjust. We refer to the rule of equally divided damages, which directs that where two vessels collide as a result of the negligence of both, damages will be divided equally regardless of comparative fault. *The Schooner Catharine* v. *Dickinson*, 58 U.S. (17 How.) 170 (1854); *The Atlas*, 93 U.S. 302 (1876). The severe inequity of this rule has perhaps never been more acutely demonstrated than in this case. The fault of the San Jacinto in travelling at an unreasonable speed in a fog, in failing to give appropriate signals, in failing to maintain a proper lookout, in making a U-turn across the path of the Santa Maria and in failing to keep the barge it was towing under control (A. 22), was termed by the Court of Appeals as "flagrant and shocking" (A. 36). The fault of the Santa Maria, on the other hand, is questionable; at most it amounted to, in the words of the District Court, a "possible technical violation" (A. 24-25). Yet whatever the fault of the Santa Maria, *neither of the Courts below found it to be a contributing cause of the collision.*[13] Equal division of dam-

[13] The oppressiveness of the divided damages rule is exacerbated in this case by its association with the rule of *The Pennsylvania*, 86 U.S. 125 (1874), which requires the

ages in such a situation is manifestly unjust.

The rule of divided damages has been criticized repeatedly by lower federal courts as "unfair," *Ahlgren* v. *Red Star Towing and Transp. Co.*, 214 F.2d 618, 620 (2nd Cir. 1954), "illogical," *Marine Fuel Transfer Corp.* v. *The Ruth*, 231 F.2d 319, 321 (2nd Cir. 1956), "egregious," *Ulster Oil Transport Corp.* v. *The Matton No. 20*, 210 F.2d 106, 110 (2nd Cir. 1954) (Learned Hand, dissenting), "unjust," *Tank Barge Hygrade* v. *The Gatco N.J.*, 250 F.2d 485, 488 (3rd Cir. 1957), "antiquated," *National Bulk Carriers, Inc.* v. *United States*, 183 F.2d 405, 410 (2nd Cir. 1950), cert. den. 71 S. Ct. 89 (Learned Hand dissenting), and as promoting "irrationality," *Oriental Trading and Transport Co.* v. *Gulf Oil Corp.*, 173 F.2d 108, 111 (2nd Cir. 1949), cert. den. 69 S. Ct. 1162.[14] Federal Judges have long chafed at having to

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Santa Maria to prove that her violation of Article 16 *could not possibly* have contributed to the collision with the San Jacinto (A. 36). Obviously this is an impossible burden of proof for petitioner to carry. The net result is that the Santa Maria is held liable equally with the San Jacinto *without any finding that her statutory violation contributed to the collision.*

[14] Other decisions critical of the rule include *In re Adams Petition*, 125 F. Supp. 110 (S.D. N.Y. 1954); affd. 237 F.2d 884 (2d Cir. 1956), cert. den. 352 U.S. 971, 77 S. Ct. 364 (1957); *Luckenbach S. S.* v. *United States*, 157 F.2d 250 (2d Cir. 1946); *The City of Chattanooga*, 79 F.2d 23 (2d Cir. 1935); and *St. Louis-San Francisco Ry.* v. *M/V D. Mark*, 243 F. Supp. 689 (S.D. Ala. 1965). Examples of academic criticism are Staring, "Contribution and Division of Damages in Admiralty and Maritime Cases," 45 Cal. L. Rev. 304 (1957); Allbritton, "Division of Damages in Admiralty —A Rising Tide of Confusion," 2 Journal of Maritime Law and Commerce, 322 (1971); Jackson, "The Archaic Rule of Dividing Damages in Marine Collisions," 19 Ala. L. Rev.

apply the rule to cases where there was a clear disparity of fault.[15] Yet they have applied it in the belief that only this Court possessed the power to alter the law.[16] Even this Court itself has acknowledged the rule's potential for injustice. In *The Umbria*, *supra*, a case which involved a factual situation much like the one here, the Umbria was proceeding full speed through a fog when it collided with the Iberia, which had improperly changed course. Even though both vessels were clearly at fault, this Court applied the *"City of New York* rule" to hold the Umbria *solely* at fault because of its "gross" misconduct. 17 S. Ct. at 612-613.[17]

Perhaps the most telling criticism of the equal division rule is the oft-noted fact that the United States is the only major sea-faring nation in the world to adhere to it. See *Staring*, "Contribution and Division of Damages in Admiralty and Maritime Cases," 45 Calif. L. Rev. 304, 340-341 (1957). The other nations—including England, from which we obtained

263 (1967); Mole & Wilson, "A Study of Comparative Negligence," 17 Corn. L. Q. 333 (1932); and Huger, "The Proportional Damage Rule in Collisions at Sea," 13 Corn. L. Q. 531 (1928).

[15] See, e.g., the excellent opinion of Judge Miner in *N. M. Paterson & Sons, Ltd.* v. *City of Chicago*, 209 F. Supp. 576 (N.D. Ill. 1962), revd. 324 F.2d 254 (7th Cir. 1963).

[16] See, e.g., *Ahlgren* v. *Red Star Towing & Transp. Co.*, 214 F.2d 618 (2d Cir. 1954).

[17] Although the *City of New York* rule was fashioned to avoid the unfairness of dividing damages where there is a great disparity of fault, the rule is itself unfair because it arbitrarily absolves one vessel from fault and subjects the other to liability out of proportion to its fault. See Staring, *supra*, note 14 at 341 n. 242.

the rule—have adopted the 1910 Brussels Convention which allocates fault proportionately in cases where it is possible to do so.[18] Any assertions that a comparative fault rule would be unworkable are refuted by the apparently satisfactory operation of the rule in these countries, see *In Re Adams Petition*, *supra*, 125 F. Supp. at 114, not to mention our own experience with state and federal comparative fault statutes—including maritime statutes.[19] By clinging to a legal dinosaur which has been repudiated by virtually all civilized nations our admiralty system forfeits the uniformity of maritime doctrine with other countries which is so essential to international commerce.

Some of the most creative law-making of this

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[18] A translation of relevant parts reads as follows:

"Art. 2. If the collision is accidental, if it is caused by force majeure, or if the causes of the collision are in doubt, the damages shall be borne by those who have suffered them.

". . .

"Art. 4. If two or more vessels are in fault, the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally.

"The damages caused either to the vessels, or to their cargoes, or to the effects or other property of the crews, passengers, or other persons on board, shall be borne by the vessels in fault in the above proportion without joint and several liability toward third parties. . . ." 6 Benedict on Admiralty (7th Ed. Rev.) at 39.

[19] E.g., Federal Employers Liability Act, 45 U.S.C.A. § 51-59; Merchant Marine (Jones) Act, 46 U.S.C.A. § 688; Death on the High Seas Act, 46 U.S.C.A. § 766. For a listing of various state railway acts, labor acts, and comparative negligence statutes, see Prosser, Law of Torts (4th Ed.) 435-438.

Court has taken place in the field of admiralty. *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U.S. 684, 690, 70 S. Ct. 861, 865, 94 L. Ed. 1206 (1950). For example, this Court has rejected the equal division rule where personal injury is involved. *The Max Morris*, 137 U.S. 1 (1890);[20] see also *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953). Recently, this Court created a remedy for wrongful death arising from unseaworthiness in state territorial waters. *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 90 S. Ct. 1772 (1970). These decisions reflect the doctrine that damages in admiralty are given or withheld upon enlarged principles of justice and equity and are within the discretion of the court. *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826); *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827). And inasmuch as we are asking this Court to change a rule of damages and not one which regulates conduct directly, there is no problem of upsetting the justifiable expectations of parties who would be affected by such a decision.

Of utmost significance, these previous decisions by the Court were designed to make admiralty law more just. Yet one fundamental injustice remains to be corrected. In the words of a distinguished admiralty practitioner,

> "The present practice is a discredit to admiralty, which prides itself on its enlightened jus-

[20] This decision was subsequently implemented by Congress as the Merchant Marine (Jones) Act, 46 U.S.C.A. § 688.

tice, flexibility, and equity and has formerly pointed out the path of progress to common law jurisdictions that today, in this vital matter, have overtaken and passed it. This is not the result of a lack of desire on the part of the admiralty judges but of the failure of the admiralty bench and bar to consult their history and to appreciate that, if they desire justice, they have only to do it.[21]

Respectfully submitted,

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[21] Staring, *supra*, note 14 at 344.

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

UNION OIL COMPANY OF CALIFORNIA, a corporation, *Plaintiff,* v. The Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, their engines, boilers, tackle, apparel and furniture; and STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation, *Defendants,* STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation, *Cross-Plaintiffs,* v. UNION OIL COMPANY OF CALIFORNIA, a corporation, and the Tanker SS SANTA MARIA, *Cross-Defendants.*	Civil No. 68-1 OPINION

KILKENNY, JUDGE:

This is an admiralty case involving the collision of the SS SANTA MARIA, bareboat chartered by plaintiff, with the Barge OLIVER J. OLSON III in tow of the Tugboat SAN JACINTO on the Columbia River in the area between Waterford light and Cooper Point, although the parties are in dispute as to which side

of the channel. Plaintiff seeks to recover its damages resulting from the collision and defendants, owners of the Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, have cross-complained to recover their damages resulting from the collision.

The following facts have been agreed upon by the parties:

The Union Oil Company of California is a California corporation and was the bareboat charterer of the SS SANTA MARIA, a tanker of American registry.

Defendant Star & Crescent Towboat Company is a California corporation and is the owner and operator of the Tugboat SAN JACINTO and defendant Oliver J. Olson Company is a California corporation and is the owner of the Barge OLIVER J. OLSON III.

On or about December 24, 1967, at approximately 2030 hours, the SS SANTA MARIA, piloted by a Columbia River pilot, was proceeding upstream in the Columbia River (a narrow channel) in the area between Waterford light and Cooper Point and the Tug SAN JACINTO, with the Barge OLIVER J. OLSON III towed astern on a tow line was proceeding downstream in the same general area when the bow of the SS SANTA MARIA was in collision with the starboard side of the Barge OLIVER J. OLSON III causing damage to both the bow of the SS SANTA MARIA and the starboard side of the Barge OLIVER J. OLSON III.

Involved in this case are clear cut issues of fact. Commonsense and the overwhelming weight of the evidence supports the plaintiff's contentions and I have no difficulty in finding:

(1) At all times mentioned herein, the SS SANTA MARIA was on its own side of the Columbia River Channel.

(2) The collision of the SS SANTA MARIA with the Barge OLIVER J. OLSON III was solely the fault of the Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III and those in charge of their navigation. Prior to the collision, the SS SANTA MARIA was proceeding upstream on her own side of the Columbia River Channel and downstream of the collision point, she made both a visual and a radar sighting of the Tug SAN JACINTO and its tow which then appeared to be on their own side of the Channel. The SS SANTA MARIA observed patchy fog conditions ahead and proceeded at half speed blowing her fog signal. Prior to the collision the SS SANTA MARIA lost visual contact with the tug though she herself was out of the fog. When the SS SANTA MARIA was approaching abeam of Light No. 70 and on the edge of the fog bank, she sighted the Tug SAN JACINTO headed across her bow. She immediately went full astern and blew both the danger signal and the astern signal. The Tug SAN JACINTO cleared her bow but the Barge OLIVER J. OLSON III struck her port bow and the force of the impact swung the bow to the starboard and it grounded on the Oregon shore on a heading of 090.

(3) The SAN JACINTO and the OLIVER J. OLSON III and those in charge of their navigation were at fault and negligent, proximately causing the grounding and damage, in the following particulars:

(a) In navigating the tug and barge at a speed which was unreasonable for the river and weather conditions of fog and mist then and there existing.

(b) In failing to maintain a sufficient lookout, both visually and by radar, in order to ascertain the presence and position and course of the SS SANTA MARIA.

(c) In acting hastily and without sufficient cause in pulling the tow across the channel when there was adequate clearance for the tug and barge to pass port to port.

(d) In failing to ascertain the risk of collision between the vessels and to sound a danger signal.

(e) In failing to sound fog signals when approaching and while passing through a fog bank.

(f) In failing to reduce speed, stop or reverse or otherwise take any evasive action to avoid crossing the bow of the SS SANTA MARIA.

(g) In turning directly across the channel into the path of the SS SANTA MARIA and thereby navigating on the wrong side of the channel.

(h) In failing to keep the tow under control and in allowing it to veer across the channel in the path of the SS SANTA MARIA and strike the bow of the SS SANTA MARIA.

(4) The faults and negligence of the SAN JACINTO and the Barge OLIVER J. OLSON III were major and fully account for the collision with the SS SANTA MARIA.

(5) Additionally, the collision was proximately caused by the sole fault and negligence of the Tug SAN JACINTO and the Barge OLIVER J. OLSON III and those in charge of their navigation in that they were in violation of the following Inland Rules, by which violation they were presumptably at fault:

(a) Inland Rule, Article 18, Rule III, 33 U.S. Code § 203, in failing to give a danger signal.

(b) Inland Rule, Article 15(2)(e), 33 U.S. Code § 191 in failing to sound any or adequate fog signals while proceeding towards, into and through a fog bank.

(c) Inland Rule, Article 16, 33 U.S. Code § 192 in proceeding at an unreasonable speed for the existing circumstances and conditions of fog and mist.

(d) Inland Rule, Article 29, 33 U.S. Code § 221, in failing to keep and maintain a proper lookout both visually and on radar to ascertain the true course of the SS SANTA MARIA.

I find that as a result of the aforesaid acts of fault and negligence on the part of the defendants, the SS SANTA MARIA sustained substantial damage to her hull, was laid up and Union Oil Company of California sustained damages.

Defendants and cross-plaintiffs have failed to es-

tablish fault on the part of the SS SANTA MARIA, and those in charge of her navigation, in any one or more of the particulars charged in their contentions and have failed to establish that any one or more of such alleged acts proximately contributed to the collision and resulting damage.

There is no doubt in my mind but that the SS SANTA MARIA "ascertained" the position of the Tug SAN JACINTO prior to and at the time of the Tug SAN JACINTO's fog signals. Consequently, the SS SANTA MARIA was justified in proceeding without stopping her engines. This "ascertainment" may be made by radar and is an adequate justification for failure to comply with the technical requirements that the engine be stopped. For that matter, it probably would be a lack of good judgment on the part of those in charge of the SS SANTA MARIA to stop their engines and lose their steerage way in this very narrow channel. *United States* v. *The Motor Ship HOYANGER*, 265 F. Supp. 730 (W.D. Wash. N.D. 1967); *Universal Ins. Co.* v. *THE COAST BANKER*, 129 F.2d 395 (9th Cir. 1942). The decision in *China Union Lines, Ltd.* v. *A. O. Andersen & Co.*, 364 F.2d 769 (5th Cir. 1966), is very persuasive on my decision on the facts in this case. Here, those in charge of the navigation of the SS SANTA MARIA had no reason to believe that the defendants would cut across the bow of their ship.

It is my view that any possible violation of Article 16 of the Inland Rules by the SS SANTA MARIA, or

those in charge of her navigation, were technical in nature and were not a contributing cause of the collision. The law on this subject is clear. *White Stack Towing Corp.* v. *Bethlehem Steel Co.*, 279 F.2d 419 (4th Cir. 1960); *Universal Ins. Co.* v. *THE COAST BANKER, supra; China Union Lines, Ltd.* v. *A. O. Andersen & Co., supra.* Defendants cannot shrould themselves with the rule of *in extremis.* They placed themselves in their dangerous position by failing to keep a proper lookout and other negligent acts as aforesaid. *THE JAMES A. LAWRENCE*, 117 F. 228 (2d Cir. 1902); *ATLAS MARU-ELENE*, 1961 A.M. C. 242 (D.C. Md. 1961).

The foregoing shall constitute my findings and conclusions on the issues of liability. I suggest that counsel for the respective parties arrange a conference in connection with plaintiff's damages. If there is no agreement, I shall fix a time for hearing on the issue of damages.

DATED this 3rd day of July, 1969.

John F. Kilkenny
District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNION OIL COMPANY OF CALIFORNIA, a corporation,
Plaintiff-Appellee,

v.

The Tugboat SAN JACINTO and the Barge OLIVER J. OLSON III, their engines, boilers, tackle, apparel and furniture; and STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation,
Defendants-Appellants,

STAR & CRESCENT TOWBOAT COMPANY, a corporation, and OLIVER J. OLSON & COMPANY, a corporation,
Cross-Plaintiffs-Appellants,

v.

UNION OIL COMPANY OF CALIFORNIA, a corporation, and the Tanker SS SANTA MARIA,
Cross-Defendants-Appellees.

No. 25,775

[December 2, 1971]

Appeal from the United States District for the District of Oregon

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Before: CHAMBERS and WRIGHT, Circuit Judges, and McNICHOLS, District Judge.*

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* Honorable Ray McNichols, United States District Judge, District of Idaho, sitting by designation.

WRIGHT, Circuit Judge:

The appeal in this admiralty case requires us to consider the continuing vitality of the half-distance rule as the appropriate measure of the statutory command to go at moderate speed in fog. 33 U.S.C. § 192.

On Christmas eve 1967 a Union Oil Company tanker, the Santa Maria, collided with a lumber barge towed by the tugboat San Jacinto. The vessels were moving in darkness (8:32 p.m.) through most and fog in the narrow channel of the Columbia River between Waterford Light and Cooper Point, ten miles downstream from Longview, Washington. Both vessels sustained damage, and their owners brought libels and cross-libels in admiralty. The district court held the tug and barge solely at fault and exonerated the Santa Maria. We reverse, since we have concluded that the fault of both vessels contributed to the collision.

The Santa Maria, fully loaded with 17,000 tons of petroleum products, proceeded upstream toward Portland on the Oregon side of the channel. As the tanker passed Waterford Light those aboard could sight her course ahead for one and a half to two miles through haze and slight drizzle. A thick bank of fog obscured a stretch of water upstream near the Washington shoreline, to the port side of the Santa Maria's planned course. The vessel moved upstream at half speed, seven to eight knots, while nearing the fog bank.

The San Jacinto and its barge proceeded down-

stream through the low fog hugging the Washington bank, as a passing freighter informed the Santa Maria of the tug's approach. The tanker's pilot first sighted the tug, both visually and by radar, when the San Jacinto was near Cooper point, on the extreme Washington side of the channel. At that time the vessels were more than a mile apart. The tug then disappeared into the fog, breaking visual contact. The Santa Maria's pilot did not follow the San Jacinto's progress by radar, assuming apparently she would continue on her course along the Washington shore.

Meanwhile, those aboard the tug were unaware of the Santa Maria's approach. The San Jacinto's inexperienced crew attempted to feel their way through the fog by watching closely the contours of the adjacent shore, peering through the haze at the Washington bank and playing their radar on it. The district court found the tug at fault for neglecting to keep a proper lookout, failing to sound fog signals, and navigating too rapidly in the thick mist.

The tug crew suddenly glimpsed the range lights of a large ship looming through the fog less than a thousand feet ahead.[1] the lights were off the tug's starboard bow, or so the captain thought leading him to believe the tanker had veered to the wrong side of the channel. Fearing imminent collision, the tug captain executed a sharp U-turn to his left and attempted to run upstream away from the tanker. The tugboat successfully negotiated the turn, but the heavy lumber

[1] Witnesses estimated the distance at 150 to 300 yards.

barge behind it swung slowly around on its 250-foot line and sideslipped across the channel, striking the Santa Maria's port bow.

The tanker's watch had just resighted the San Jacincto when the tug began its erratic turn. The Santa Maria reacted quickly, putting its engines full astern and blowing danger signals. The barge smashed into the tanker's bow one minute later. Estimates of the Santa Maria's speed at the moment of impact range from three to seven knots.[2]

Evidence at the trial showed the tugboat had become disoriented in the fog and that the Santa Maria had remained well on the Oregon side of the channel. The district court found the tug captain had acted hastily and without sufficient cause in making the sudden turn that pulled the barge into the Santa Maria's path. Had the tug continued downstream the vessels would have passed safely port to port.

Appellants concede the tug's negligence, but seek a ruling of mutual fault. They contend that the tanker's speed while approaching the lateral bank of fog violated long-established rules governing operation under conditions of reduced visibility.

I.

Article 16 of the Inland Rules, 33 U.S.C. § 192, reads in part:

> Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having

[2] The pilot thought the speed at impact was six to seven knots. The third mate guessed it was three to four knots.

careful regard to the existing circumstances and conditions.

Although the statute does not define moderate speed, a well-recognized judicial gloss commands that "a vessel shall not proceed in a fog at a speed at which she cannot be stopped dead in the water in one-half the visibility before her." *The Silver Palm*, 94 F.2d 754, 757 (9th Cir. 1937). This half-distance rule has long had the force of law in this Circuit.[3]

The Santa Maria's speed was immoderate as measured by the half-distance rule. The trial court found that the tanker steamed ahead at half speed while approaching the edge of the fog bank. The chief mate testified that at half speed the ship would travel at seven to eight knots.

No more than 900 feet separated the vessels when the Santa Maria first saw the tug emerging from the fog. Although the Union Oil Company presented no evidence about her stopping capability, we think it fair to assume that a fully loaded tanker doing seven to eight knots could not conceivably come to a stop in 450 feet. The Santa Maria was still moving upstream at a speed between three and seven knots when the barge struck her bow. And since the tug had turned back upstream and the barge was swinging across

[3] *See, e.g.*, Universal Insurance Co. v. The Coast Banker, 129 F.2d 395 (9th Cir. 1942); The Silver Palm, 94 F.2d 754 (9th Cir. 1937); The Ernest H. Meyer, 84 F.2d 496 (9th Cir. 1936); United States v. Motor Ship Hoyanger, 265 F. Supp. 730 (W.D. Wash. 1967); Weyerhaeuser Steamship Co. v. United States, 174 F. Supp. 663 (N.D. Cal. 1959).

the channel sideways, the Santa Maria before impact had probably covered well over half the distance that initially separated the two vessels.

Appellees argue that the Santa Maria's speed would have allowed it to stop well within the visibility ahead on her own course, which was one and a half to two miles. This observation misses the mark. The relevant distance was no more than 900 feet, the maximum distance separating the vessel when the tug emerged from the fog.

A vessel navigating near a fog bank owes the duty of one immersed in fog. The speed and visibility calculations must be performed:

> ". . . with reference to the distance within which she could be brought to a stop in the water, before *any* course of *any* vessel emerging from the fog on either side would cross her projected course along the fog bank at its nearest point." *The Silver Palm*, 94 F.2d 754, 767 (9th Cir. 1937) (emphasis in original).

II.

Appellees contend that the Santa Maria's speed was not excessive because she had the San Jacinto in view or on radar at all times. The facts do not support this assertion. The pilot's testimony showed he had not followed the tug's progress on his radar screen, although he did make a radar sighting when the tug was over a mile upstream. The district court found,

> "Prior to the collision the SS SANTA MARIA lost visual contact with the tug though she herself was out of the fog. When the SS SANTA

MARIA was approaching abeam of Light No. 70 and on the edge of the fog bank, she sighted the Tug SAN JACINTO headed across her bow." 304 F. Supp. 519, 521 (D. Ore. 1969).

Ignoring this factual inaccuracy for the moment, we read appellees' argument to assert that a vessel operating with radar should be free from the strictures of the half-distance rule. The rule was developed in an earlier day, when speeding through fog was sheer folly, and pilots can now use electronic aids when visibility is limited. But knowledge of another vessel's presence does not solve all problems. Marine collisions continue to occur; at times the images on radar screens lull pilots into a false sence of security and encourage disaster.

If both vessels passing in fog correctly read and interpret their electronic equipment, there is little danger of collision. We must recognize, however, that inevitably men will make mistakes and mechanical aids will fail. Numerous collisions have happened despite radar sightings.[4]

Observance of the rule serves now as an extra safety precaution to avoid collision should a ship's

[4] *See, e.g.*, O/Y Finlayson-Forssa v. Pan Atlantic Steamship Corp., 259 F.2d 11 (5th Cir. 1958); Norscott Shipping Co. v. Steamship President Harrison, 308 F. Supp. 1100 (E.D. Pa. 1970); Holland-America Line v. Motor Vessel Johs. Stove, 286 F. Supp. 69 (S.D.N.Y. 1968); United States v. Motor Ship Hoyanger, 265 F. Supp. 730 (W.D. Wash. 1967); Skibs A/S Siljestad v. Steamship Mathew Luckenbach, 215 F. Supp. 667 (S.D.N.Y. 1963); Weyerhaeuser Steamship Co. v. United States, 174 F. Supp. 663 (N.D. Cal. 1959). All of these decisions invoke the half-distance rule.

radar malfunction or be misread. That cushion of safety can be vital. We do not think that use of radar removes the need for observance of the half-distance rule.

Even if one knows an oncoming vessel's location, one cannot always be sure the reverse is true. On such inland waters as the Columbia River, it cannot be assumed that an approaching craft has radar equipment and, even if it does, it may have no experienced radar operator.

Safety in fog on the open seas or inland waters requires two-way observation. There is danger of collision whenever a vessel cannot ascertain the position of another in the vicinity. The half-distance rule demands "defensive driving" and enables one master to escape the consequences of another's negligence or mistake.

III.

Appellees next argue that speed in violation of the rule may be justified by a need to maintain steerageway in a narrow channel. It is said that a large, heavily loaded ship may have difficulty steering when traveling below a given speed, say five knots, under adverse wind and tide conditions. But we have no evidence that the Santa Maria could not be safely navigated at less than seven to eight knots.[5]

[5] To the contrary, the pilot testified, "You can't slow a loaded ship, any ship, tanker or otherwise, from a full ahead to a slow bell without losing your steering. You have to reduce it slowly. But after you once get the speed off, they handle very good."

Even assuming such a handicap, we do not think the rule should be disregarded by vessels whose bulk necessitates immoderate speed, for a ship should not be underway if she cannot go at a safe speed. The steerageway excuse has been rejected by nearly every court to consider it. *See, e.g., Anglo-Saxon Petroleum Co.* v. *United States*, 224 F.2d 86 (2d Cir. 1955); *Holland-America Line* v. *M/V Johs. Stove*, 286 F. Supp. 69 (S.D.N.Y. 1968); *United States* v. *Motor Ship Hoyanger*, 265 F. Supp. 730 (W.D. Wash. 1967).

IV.

Appellees recognize these authorities, but urge us to abandon them and follow the path taken by a recent Fifth Circuit decision, *Hess Shipping Co.* v. *SS Charles Lykes*, 417 F.2d 346 (5th Cir. 1969).[6] *Hess Shipping* rejected the traditional half-distance rule. It declared instead that moderate speed is relative and must vary with the circumstances of each case. Applying this flexible standard, the court held that six knots through dense fog was moderate speed. It reached this startling conclusion by accepting the steerageway justification: "[A]ny reduction in speed would have seriously impaired the pilot's ability to control the vessel . . ." 417 F.2d at 350. The holding in *Hess Shipping* appears to mean that any ship too bulky to navigate safely in fog may exercise less caution.

A dissenting judge characterized the *Hess Ship-*

[6] On rehearing en banc, the Fifth Circuit split seven to seven, so this decision was affirmed by operation of law. 424 F.2d 633 (5th Cir. 1969).

ping interpretation of Inland Rule 16 thus:

> "The Court treats it as just a floating intersectional collision in which the fact finder can look back and see what prudent people would have done." 417 F.2d at 351.

This standard would allow pilots to make individual judgments about what speed is reasonable under the prevailing conditions. The half-distance rule takes that decision from their hands by imposing a formula to fit all circumstances. We are persuaded that the certainty supplied by the half-distance rule is preferable to the *ad hoc* judgment of a pilot navigating through fog.

Substituting the pilot's on-the-spot decision places too much reliance on individual competence and significantly expands the potential for pilot error.

> "Fog rules take into account the uncertainties as this enigma of nature shuts out sound and sight and frequently understanding." *O/Y Finlayson-Forssa* v. *Pan Atlantic Steamship Corp.*, 259 F.2d 11, 22 (5th Cir. 1958).

Selecting a speed in circumstances of poor visibility necessarily requires a master to balance the risk of accident against commercial pressures for a fast voyage. The half-distance rule comes down hard on the side of safety. If we take away the deterrent of the rule marine commerce may move more swiftly, but with more accidents. Even with the rule in force, the exigencies of commerce sometimes push pilots to excessive speeds.

> "The fact that the rule is more honored in the breach than in the observance merely means that people are usually willing to take chances rather than submit to the galling necessity of poking about in a fog; and, although the usual measure of the care demanded is that commonly used in the calling, that is not the inevitable standard. Common prudence is not always adequate prudence; the courts may and at times do condemn practices that are current in the business." *Anglo-Saxon Petroleum Co.* v. *United States*, 222 F.2d 75 (2d Cir. 1955).

This passage by Judge Learned Hand indicates that even so strong and definite a standard as the half-distance rule has questionable deterrent value. Any lower standard would create a much higher risk of marine tragedy.

The Santa Maria violated the statutory command of Inland Rule 16 and the violation is not excused because the fault of the San Jacinto was more flagrant and shocking. The Santa Maria's only chance to escape liability is to prove that her statutory fault could not possibly have contributed to the collision. *The Pennsylvania*, 86 U.S. 125 (1874); *The Silver Palm*, 94 F.2d 754 (9th Cir. 1938); *O/Y Finlayson-Forssa* v. *Pan Atlantic Steamship Corp.*, 259 F.2d 11 (5th Cir. 1958). On this record she cannot meet that heavy burden.

Her statutory fault renders the Santa Maria liable for half damages. The judgment of the district court should be modified to hold both vessels at fault, and the damages divided.

Remanded to the district court to ascertain appellants' damages.

APPENDIX C

28 U.S.C. § 1254: *Courts of appeals; certiorari; appeal; certified questions*

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1333: *Admiralty, maritime and prize cases*

The district courts shall have original jurisprudence, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime juris-

diction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C. § 2101: *Supreme Court; time for appeal or certiorari; docketing; stay*

* * * * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

33 U.S.C. § 192: *Speed in fog, etc. (Art. 16)*

Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.